

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

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| <b>IDAHO TELEPHONE ASSOCIATION,</b>    | ) |                             |
| <b>CITIZENS TELECOMMUNICATIONS</b>     | ) | <b>CASE NO. QWE-T-02-11</b> |
| <b>COMPANY OF IDAHO, CENTURYTEL OF</b> | ) |                             |
| <b>IDAHO, CENTURYTEL OF THE GEM</b>    | ) |                             |
| <b>STATE, POTLATCH TELEPHONE</b>       | ) |                             |
| <b>COMPANY AND ILLUMINET, INC.</b>     | ) |                             |
|  | ) |                             |
| <b>COMPLAINANTS,</b>                   | ) |                             |
|  | ) |                             |
| <b>vs.</b>                             | ) |                             |
|  | ) |                             |
| <b>QWEST CORPORATION, INC.,</b>        | ) | <b>ORDER NO. 29310</b>      |
|  | ) |                             |
| <b>RESPONDENT.</b>                     | ) |                             |
|  | ) |                             |

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The Complainants in this case, Idaho Telephone Association, Citizens Telecommunications of Idaho, Electric Lightwave, Inc, and Illuminet, challenged Qwest Corporation, Inc.'s implementation of new message charges associated with Qwest's Signaling System 7 (SS7) signaling network. The new charges became effective June 1, 2001, when Qwest filed revisions to its Southern Idaho Access Service Catalog. The Commission issued final Order No. 29219 on April 15, 2003, concluding that Qwest's application of SS7 message charges "to local/EAS traffic, to joint access traffic subject to meet-point-bill arrangements, and to intraLATA toll traffic originated by a Qwest customer, was improper and in violation of existing rates or inter-carrier arrangements." Order No. 29219 p. 22.

On May 5, 2003, Qwest filed a Motion for Stay of Order No. 29219, pending resolution of its Petition for Reconsideration and, if filed, an appeal. On May 6 the Company filed a Petition for Reconsideration. The Complainants also filed a Petition for Reconsideration and Clarification addressing two discrete points in the Commission's Order. Recognizing the complexity of issues discussed in the petitions, the Commission issued Order No. 29251 on June 2, 2003, granting the Petitions for Reconsideration "for the limited purpose of determining whether based on the record we should modify Order No. 29219 or conduct a supplemental hearing as requested by Qwest." Order No. 29251 p. 2. By this Order the Commission clarifies Order No. 29219 but denies further relief on the Petitions for Reconsideration.

## **QWEST'S PETITION FOR RECONSIDERATION**

Qwest included in its Petition an attachment identifying 24 errors of fact and 21 errors of law the Company alleges were committed by the Commission in Order No. 29219. In the Petition itself, however, Qwest categorizes and argues the errors it believes the Commission made in its final Order into three areas:

1. The Commission erred by retaining jurisdiction over all aspects of the Complaint, particularly as to the rates for SS7 signaling used in the provision of intraLATA toll traffic;
2. The Commission erred in finding the SS7 message charges to be unreasonable and improper;
3. Qwest has uncovered new and additional evidence showing that
  - (a) Illuminet was aware of the contents of the changes to the Idaho access service catalog several months before Qwest filed it;
  - (b) before Qwest filed the catalog changes, Qwest informed Illuminet that Qwest believed Illuminet was not acting as an agent of its customers;
  - (c) Qwest provided a copy of the revised Access Catalog to Illuminet before filing with the Commission.

Based on the new facts it discovered, Qwest asserts Illuminet should be estopped from complaining about payment of past charges under the Access Catalog. Qwest asked the Commission to grant reconsideration and order a new evidentiary hearing to determine whether Illuminet was acting as an agent for its customers and whether Illuminet knew of the terms of the Access Catalog revisions in advance. Qwest identified four topics it will address with evidence if the Commission grants reconsideration and allows a new evidentiary hearing:

First, the Commission should consider the history of deployment of SS7 technology in Idaho and how those facts establish whether SS7 was ever a Title 61 service subject to the Commission's jurisdiction;

Second, the Commission should consider how the operation of Qwest's FCC-approved tariff at the interstate level demonstrates the appropriateness of the SS7 message charges for intraLATA toll;

Third, the Commission should consider the history of Qwest's interactions with Illuminet before Qwest filed the catalog, which history will directly

conflict with the Commission's finding that Qwest acted "unilaterally" and without "discussion" of the signaling charges with affected customers;

Fourth, the Commission should evaluate whether Illuminet held itself out as an "agent" of its customers.

Qwest Petition for Reconsideration, p. 4.

As it did in its post-hearing briefs, Qwest argues at length in its Petition that the Commission lacks jurisdiction to hear the Complaint or to order the relief it did in Order No. 29219. Much of Qwest's argument on jurisdiction depends, however, on Qwest's characterization of the Commission's Order as an attempt to establish rates for services that are outside the Commission's price-setting authority. Qwest contends, for example, that the Commission's determination that implementation of the new message charges was unfair and unreasonable "is tantamount to setting the rate." Qwest Petition p. 5. Qwest asserts its newly uncovered facts "establish that the Commission's Order is nothing more than an attempt to set rates for a service over which it has no jurisdictional authority." Qwest Petition p. 8. Qwest claims the Commission in its Order "finds it has the ability to set SS7 rates because to find otherwise could 'leave injured parties with no remedy.'" *Id.* Qwest contends the Commission, while acknowledging it has no authority to set rates for toll traffic, did "exactly that" when "it found the rates for Qwest's SS7 services unjust and unreasonable." Qwest Petition, p. 9 and p. 11. According to Qwest, "[t]he Complaint is about Qwest's rates – rates over which the Commission has no jurisdiction." Qwest Petition, p. 10. Qwest concludes its argument on the Commission's jurisdiction by stating "Idaho law makes plain that the Commission is without jurisdiction to set rates for a Title 62 service. Nonetheless, that is the net effect of Commission Order No. 29219." Qwest Petition, p. 13.

The new facts Qwest alleges are relevant to its jurisdictional argument establish that SS7 signaling service was never a Title 61 service, since it was not available in Idaho until the early 1990s, some time after Qwest elected Title 62 regulation for most of its services. Qwest again reminds that the Commission lacks jurisdiction to set prices for Title 62 services. Repeating the arguments in its post-hearing briefs, Qwest asserts that under *Idaho Code* § 62-614, although the Commission has jurisdiction to hear a dispute, it must resolve it "in accordance with applicable provisions of law." Qwest contends, because the Commission has no pricing

authority over Title 62 products and services, it acted beyond the remedies available under applicable provisions of law.

Qwest also asserts the Commission has no authority under *Idaho Code* § 62-605(5) to regulate prices for Title 62 services. Quoting the Commission's Order where it states that "Qwest implemented SS7 message charges that are already recovered in customer rates on local traffic, including EAS traffic, or pursuant to existing inter-carrier traffic agreements," Qwest contends the statement is "not only unsupported by any cost evidence, but demonstrates the Commission used an inappropriate standard of review for these SS7 message charges." Qwest Petition, p. 11. To support its argument, Qwest again asserts that the Commission has no authority to regulate any Title 62 service prices.

Qwest also contends the Commission was not empowered to hear the Complainants' dispute by its authority to set prices for unbundled network elements (UNEs) under the Telecommunications Act. Qwest notes none of the Complainants are purchasing SS7 signaling service as a UNE. Summarizing its argument on jurisdiction, Qwest contends it has presented new evidence to establish that the Commission never regulated SS7 services prior to July 1988 when Qwest elected for regulation under Title 62, and that the Commission is without jurisdiction to set rates for Title 62 services. By characterizing the Commission's Order as establishing rates for SS7 message signaling, the Company contends the Commission lacks jurisdiction as a matter of law to hear Complainants' case.

Regarding the substantive issues resolved by the Commission on which Qwest seeks reconsideration, Qwest largely bases its argument on "new evidence" it claims has been discovered and would be presented at a second hearing. First, Qwest would present evidence on the deployment of SS7 signaling service in Idaho. Qwest notes the Commission's conclusion that the recovery of SS7 expenses historically has been spread across *all* intrastate services, including basic local rates, intraLATA toll, enhanced features and intrastate access. Qwest contends the Commission could not have deliberately spread SS7 costs over all intraLATA services because the Commission last set rates for intraLATA toll and intrastate access prices in May 1984, well before SS7 services were deployed in Idaho. Qwest accordingly argues "the notion that the Commission has put in place cost-recovery mechanisms for SS7 expenses associated with intraLATA toll in rates is completely contrary to fact and cannot be used as a justification for entering Order No. 29219." Qwest Petition, p. 14. Noting that Illuminet pays

message charges on interstate traffic under the FCC approved structure, Qwest asserts new evidence will show that “implementation of the Access Service Catalog SS7 message charges, as they relate to intraLATA toll, is entirely consistent with the FCC’s approval of such charges for interstate toll.” Qwest Petition, p. 15.

Qwest also asserts it has uncovered new evidence it would present at a second hearing showing that Illuminet was informed of the proposed changes to the Access Catalog in advance of its filing by Qwest. For example, Qwest’s evidence would establish that “Illuminet was fully aware of the terms of the federal tariff and, as such, the Idaho Catalog, for at least eight months before its filing in May 2001.” Qwest Petition, p. 16. Qwest attached affidavits to its Petition showing that discussions had taken place between Qwest and Illuminet. One of the affidavits includes a white paper prepared by Illuminet for a November 2000 meeting, “that set forth several concerns—many of which Illuminet raised with this Commission.” Qwest Petition, p. 17. These facts establish, according to Qwest, that the Company did not act unilaterally when it implemented new SS7 message charges, contrary to what the Commission stated in Order No. 29219. Qwest argues for the first time in its Petition that its “new facts establish that Illuminet should be estopped from complaining about charges for historical purchases under the tariff.” Qwest Petition, p. 18.

The remainder of Qwest’s Petition addresses whether Illuminet is an agent of the carrier customers to which it provides SS7 signaling service. Qwest acknowledged the Commission did not make an express finding that Illuminet was acting as an agent of its customers, but Qwest nonetheless concludes “the Commission must have tacitly agreed with Illuminet’s agency argument.” Qwest Petition, p. 20. Qwest would address this in a new hearing, which it would use “to present evidence about whether agreements between Illuminet and its customers establish that Illuminet was acting as their agent when ordering SS7 via the tariff.” Qwest Petition, p. 21. At the same time, Qwest argues “that the doctrine of ‘agency’ has no applicability to this case.” Qwest Petition, p. 22. Instead, according to Qwest, “it is contractual principles, not agency principles, that the Commission must evaluate in this case.” *Id.*

#### **QWEST’S MOTION FOR STAY**

On May 5, 2003, Qwest filed a Motion to Stay Order No. 29219. The Order directed Qwest to “withdraw the revisions it made to its Access Catalog effective June 1, 2001, and refile

it only after providing the means to identify the intraLATA toll traffic properly subject to the SS7 message charges.” Order No. 29219, p. 23. The Order also directed that Qwest may not collect from the Complainants for certain SS7 message charges implemented on June 1, 2001. Qwest’s Motion asked the Commission to issue an Order to stay the effect of Order No. 29219 during the pendency of its Motion for Reconsideration, and if necessary, any appeal filed by Qwest. In its Motion, Qwest states that Order No. 29219 will have consequences for Qwest and other entities not parties to this case if it immediately takes effect. Qwest included an affidavit verifying that the Access Catalog revisions generate approximately \$66,000 each month for Qwest, exclusive of the charges contested by Complainants. Qwest asserts a stay will not have a detrimental effect on the Complainants, since the Complainants have not paid any of the contested charges.

In Order No. 29251, the Commission granted Qwest’s Motion for a Stay to preserve the status quo pending issuance of the Commission’s Order on Reconsideration.

#### **COMPLAINANTS’ PETITION FOR RECONSIDERATION AND CLARIFICATION**

The Complainants ask that the Commission grant reconsideration on one point and clarify another point in Order No. 29219. Regarding reconsideration, Complainants request the Commission reconsider its conclusion that it need not direct Qwest to issue refunds for previously assessed SS7 message charges that the Commission determined were improper. Exhibit 402 shows that Illuminet paid more than \$145,000 to Qwest, apparently under protest. An affidavit attached to the Petition for Reconsideration verifies that Illuminet paid the amount to Qwest. The Complainants thus request the Commission reconsider its conclusion to not order refunds and direct Qwest to refund the amount of \$145,232.95 to Illuminet.

On the point of clarification, the Complainants request that “the Commission clarify its order to reflect the fact that Illuminet is a private, non-common carrier third-party SS7 provider,” and is not a telecommunications corporation that provides telecommunication services to its customers. The Complainants believe language used by the Commission in its Order could be construed to conclude that Illuminet is a telecommunications carrier or telephone corporation under Idaho law.

## **ANSWERS TO PETITIONS FOR RECONSIDERATION OR CLARIFICATION**

The Complainants filed a response opposing Qwest's Petition for Reconsideration and Motion for Stay. Qwest filed an Answer opposing the Complainants' Petition for Reconsideration or Clarification.

### **Complainants' Answer.**

Complainants recommend the Commission entirely deny Qwest's Petition for Reconsideration. Complainants first argue the list of alleged errors of law and fact in Qwest's Exhibit A are conclusory, do not satisfy the Commission's rules for a petition for reconsideration, and therefore should be dismissed. Complainants also argue Qwest waived its right to contest any SS7 message charges on local/EAS traffic, and cannot now raise those issues on reconsideration. Regarding Qwest's arguments on jurisdiction, Complainants contend Qwest's arguments were all fully considered and properly rejected by the Commission.

Complainants also contend Qwest's claim that Complainants' case should be barred by principles of *quasi estoppel* is without merit. Qwest's theory is that Complainants knew in advance that Qwest was preparing its SS7 message charge revisions and waited until more than a year later to file its complaint. Complainants argue Qwest waived this claim by not presenting it as part of its case. Also, the facts Qwest points to as new evidence about Illuminet's prior knowledge were presented during the hearing, including the white paper Qwest now asserts is new evidence. Finally, Complainants contend Qwest cannot establish any of the necessary elements to apply estoppel theories to Illuminet.

Complainants also contend there is no merit to Qwest's Motion for Stay. Noting a stay is proper only upon a showing that great and irreparable damage will occur if a stay is not granted, Complainants argue Qwest has not made the requisite showing. Qwest stated in its motion that it collects SS7 charges from nine other customers, four of which are inter-exchange carriers (IXCs). Complainants point out the Order by its terms "prohibits only the collection of specific SS7 charges identified in the Order, none of which would appear to apply to IXC traffic." Complainants' Brief in Opposition, p. 18. Complainants argue Qwest has the ability at any time to prevent harm by re-filing the Access Catalog with proper charges and, if necessary, re-instating the old access charges to prevent any loss of revenues.

**Qwest's Answer.**

Qwest in its Answer to Complainants' Petition for Reconsideration claims "Complainants' submission goes a long way to establishing the need for the supplemental evidentiary hearing requested by Qwest in its Petition for Reconsideration." Qwest Answer, p. 2. Qwest claims that Complainants, by asking for reconsideration on whether Illuminet is entitled to a refund, in fact "raise a number of issues identified by Qwest in its Petition for Reconsideration." Qwest Answer, p. 3. Qwest cites as an example whether Illuminet paid the funds "under protest", which might be relevant to show "even Illuminet would agree that Qwest did not act 'unilaterally' and 'without notice.'" *Id.* Qwest asserts "the implications of this revelation [that Illuminet paid under protest] affect both the jurisdictional issues discussed below and in Qwest's Petition, and the 'agency' argument that underlies Complainants' recovery in this case." Qwest Answer, p. 4.

Qwest renews its arguments on the Commission's jurisdiction, noting that Illuminet is the only Complainant that has been billed for SS7 message charges under the Access Catalog. Thus Qwest asserts, "if the Commission is to take jurisdiction under section 62-614 of a dispute over the past SS7 message charges, it can do so only if the dispute arises out of charges that, although billed to Illuminet, are the legal responsibility of an Idaho ILEC." Qwest Answer, p. 7. Qwest contends, "with Illuminet's revelation that it has paid three months of the disputed SS7 charges and has apparently *not* passed those charges along to its customers it is clear that no ILEC has any claim for past due charges, even if one otherwise accepts the Complainants' 'agency' theory." Qwest Answer, p. 7-8. Qwest requests the Commission "grant reconsideration and allow Qwest to conduct discovery and present evidence on which past due SS7 charges, if any, are properly disputed by Idaho ILECs who are eligible to bring a claim under section 62-614." Qwest Answer, p. 8.

**DECISION**

The Commission has determined it is not necessary to convene another hearing and will deny further relief requested in the Petitions for Reconsideration, but will clarify Order No. 29219. Qwest's conclusory lists of errors it alleges the Commission committed in Order No. 29219 do not comply with the Commission's Rule of Procedure. Rule 331 requires a Petition for Reconsideration to "set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or not in

conformity with the law.” IDAPA 31.01.01.331. Qwest’s lists of alleged errors of fact and errors of law do not comply with Rule 331 and so are not properly presented for reconsideration.

On the issues Qwest did properly present in its Petition, the Commission is not convinced Qwest has identified matters improperly decided and thus in need of remedy by reconsideration. Many of Qwest’s assertions regarding the Commission’s decision simply are incorrect or are not relevant, and do not become more convincing by repetition. For example, despite Qwest’s incantation, the Commission in its Order did not attempt to establish or even evaluate the particular rates for SS7 services. The Commission instead concluded that the way Qwest implemented the new message charges was unfair and unreasonable. Based on the established record, the Commission determined that the signaling component charges had not previously been separated from the underlying local traffic. Thus, when the Commission in previous cases established rates for local and EAS calls that are subject to the Commission’s Title 61 jurisdiction, recovery of signaling costs was included in the approved rates. Likewise, the Commission in Order No. 29219 did not attempt to establish rates for toll calls or their associated signals but did conclude that the SS7 signaling charges could not be implemented separate from existing inter-carrier payment arrangements for toll traffic. The Commission did not attempt to determine whether the rates for SS7 messaging were unreasonable, but concluded their implementation violated existing arrangements between carriers for recovery of call messages.

Qwest misconstrues the Commission’s Order in other ways or raises issues not relevant to the Commission’s decision. The Commission’s decision did not depend, as Qwest implicitly recognizes, on a determination that Illuminet was an agent of its customers and was recognized as such by Qwest. It was instead contractual principles that convinced the Commission Qwest improperly and unilaterally imposed new SS7 message charges on local and intrastate toll traffic. There is no dispute that signaling is a necessary part of telephone calling traffic, and that signaling costs were not separated from the traffic until Qwest revised its Access Catalog. Because signaling historically has been part of the associated traffic, the rates and inter-carrier agreements in place, so far as the recovery of signaling costs is concerned, were premised on the accepted belief that signaling costs were recovered in Commission approved rates or agreed upon compensation arrangements. Qwest unilaterally attempted to change the compensation structure.

Other arguments raised by Qwest merit brief comment. Although it was mentioned as part of the discussion, the Commission did not rely on the Telecommunications Act and its authority to establish unbundled network element prices to resolve the dispute or determine its jurisdiction. The Commission recognized that implementation by Qwest of the SS7 message charges in the interstate domain, approved by the FCC, made sense and was appropriate. Qwest improperly applied the same logic to implement similar charges in the intraLATA arena, however, where signaling costs are recovered in a number of ways different from the interstate domain.

Regarding Qwest's relationship with Illuminet, the Commission is not convinced the new evidence Qwest proffers is in fact new or relevant. For example, the Illuminet white paper Qwest would present is already part of the record, and Illuminet's position stated there is consistent with its position and the evidence presented in the hearing in this case. By concluding Qwest's implementation of its new SS7 message charges was unilateral, the Commission did not conclude Illuminet somehow was unfairly surprised. It was unilateral in that Qwest implemented it without obtaining consensus from affected parties to change the existing and traditional means for recovering message costs. The Commission concluded that Qwest prior to implementing the Access Catalog revisions was receiving signaling compensation pursuant to (a) pre-existing rates established by the Commission (local and EAS calls) or (b) pre-existing compensation arrangements between carriers (intraLATA toll), and that the signal charges had not previously been separated from the underlying traffic. Nothing Qwest raises in its Petition for Reconsideration convinces the Commission its decision was erroneous, unreasonable, unlawful or not in conformity with law.

The Commission has determined it will not convene a new hearing. The Commission also by this Order discontinues the stay of Order No. 29219. The Commission in Order No. 29219 did not establish a deadline for Qwest to withdraw its revised Access Catalog, and Qwest in its Motion for a Stay argued that immediate withdrawal of the Access Catalog would unfairly prevent it from collecting the valid charges in the Access Catalog. Qwest has since notified the Commission, however, that it revised its Access Catalog consistent with Order No. 29219, effective July 21, 2003. Accordingly, the issue raised by Qwest in its Motion for Stay is moot.

The Commission also has determined to clarify Order No. 29219 to address the issues raised by Complainants. First, the Commission did not conclude in Order No. 29219 that

Illuminet is a telephone corporation, or that Illuminet provides telecommunication services, as defined by Idaho statutes. The record establishes that Illuminet is not a telecommunications carrier, but is instead an independent, contract provider of SS7 services to telecommunications providers. The Commission's determination on its jurisdiction was not based on the status of Illuminet. Whether Illuminet consented to the Commission's jurisdiction over its claims, or was assisting other parties in interest, there is no dispute the Commission's jurisdiction extends to the claims presented by the incumbent local exchange carriers and ELI. The record is undisputed that the improper SS7 charges imposed by Qwest are associated with traffic originating or terminating with the ILEC and CLEC Complainants, who ultimately are responsible for paying the contested charges and thus are the real parties in interest. Illuminet merely facilitates the movement of that traffic. The Commission hereby clarifies Order No. 29219 to reflect the status of Illuminet as an independent provider of SS7 services to telecommunications carriers.

The Commission also clarifies Order No. 29219 on the refund issue raised by Complainants. The Commission concluded it was not necessary to order Qwest to provide refunds for its improper SS7 message charges "because the Complainants have not paid the disputed SS7 message charges billed by Qwest, or Qwest has not actually billed for the charges." Order No. 29219 p. 20. Complainants point out that Exhibit 402 identifies an amount of \$145,232.95 paid by Illuminet on the contested charges. Without determining the accuracy of the amount paid by Illuminet, the Commission will clarify Order No. 29219 to require Qwest to refund to any of the Complainants payments made for SS7 message charges determined by the Commission in Order No. 29219 to be improper. If the parties cannot agree on the amount of payments to be refunded, any party can file a separate action with the Commission solely on that issue.

## **ORDER**

IT IS HEREBY ORDERED that further relief on the Petitions for Reconsideration filed by Qwest and by Complainants is denied.

IT IS FURTHER ORDERED that Order No. 29219 is clarified by this Order as follows: (1) Order No. 29219 is clarified to reflect the status of Illuminet as an independent, contract provider of SS7 services to telecommunications carriers; (2) Order No. 29219 is

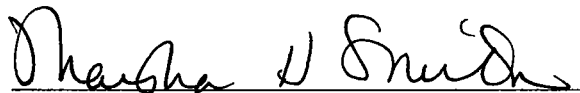
clarified to require Qwest to refund to any of the Complainants payments made for SS7 message charges determined by the Commission in Order No. 29219 to be improper.

IT IS FURTHER ORDERED that the stay entered in Order No. 29251 is lifted and is no longer in force or effect.

THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this Order or other final or interlocutory Orders previously issued in this Case No. QWE-T-02-11 may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules. See *Idaho Code* § 61-627.

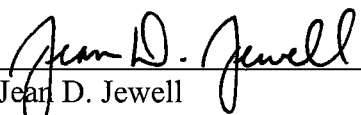
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 27<sup>th</sup> day of August 2003 .

  
PAUL KJELLANDER, PRESIDENT

  
MARSHA H. SMITH, COMMISSIONER

  
DENNIS S. HANSEN, COMMISSIONER

ATTEST:

  
Jean D. Jewell  
Commission Secretary

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